

BUREAU OF AUTOMOTIVE REPAIR

FINAL STATEMENT OF REASONS

HEARING DATES:

December 7 and 9, 2005

**SUBJECT MATTER OF
PROPOSED REGULATIONS:**

Cleanup and Revision of Smog Check Station
Regulations: Requirements for Telephone Line;
Testing of Test-Only Directed Vehicles at Test-and-
Repair Stations

SECTION AFFECTED:

§§ 3340.1, 3340.16, 3340.16.5, 3340.16.6, 3340.17,
and 3340.41, Title 16, Division 33, Chapter 1, Article
5.5, California Code of Regulations

UPDATED INFORMATION:

The *Initial Statement of Reasons* is included in the file. No changes have been made which would warrant a change to the information contained therein.

LOCAL MANDATE:

A mandate is not imposed on local agencies or school districts.

SMALL BUSINESS IMPACT:

This action will not have any adverse economic impact on businesses, including small businesses. This determination is based on the following facts or evidence/documents/testimony:

The proposed amendments do not impose any new requirements or additional restrictions. They are primarily technical, cleanup amendments that clarify existing requirements, eliminate unnecessary duplication, reorganize and relocate certain provisions into more logical and appropriate sections, and eliminate obsolete provisions.

SPECIFIC TECHNOLOGIES OR EQUIPMENT:

This action does not mandate the use of specific technologies or equipment.

CONSIDERATION OF ALTERNATIVES:

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Bureau would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

OBJECTIONS OR RECOMMENDATIONS / RESPONSES:

The following comments/objections/recommendations were made, either in writing or orally during the public comment period or at the public hearings, regarding the proposed action:

1. Greg Kelly, Greg's Auto, in an e-mail dated and received November 9, 2005, offered the following comments and recommendations:

- a. A Test-Only station is forbidden to refer consumers to a particular Test-and-Repair station by current regulation. This proposal will apply this prohibition to Test-and-Repair stations, preventing them from being able to refer consumers to a particular Test-Only station. I disagree with this proposal.

The Smog Check program has always tried to limit the "ping-ponging" of consumers between test-only stations and test-and-repair stations. To take this approach will increase the chance of ping-ponging.

I know, from experience, which test-only stations do a proper and repeatable test on a regular basis. The Test-Only stations know which test-and-repair stations perform proper repairs, because they often perform the retest. It is foolish to further handcuff the industry by changing this regulation.

While I do understand the reasoning behind the proposed change, I think it is time for a change in thinking at BAR. The cheaters are continuing to cheat with the regulations you have and this change will not stop that. Some test-only stations will always refer to the shop that kicks them back something or is in the family.

This comment/recommendation was rejected because:

Mr. Kelly's closing remarks actually help demonstrate the necessity for the proposed action and support the prohibition of referrals – "cheaters are continuing to cheat ... this change will not stop that" and "some test-only stations will always refer to the shop that kicks them back something..." That is almost like saying, "We have speed limits and we still see drivers speeding on our roadways every day, so we don't need speed limits." However, the speed limit law itself and/or or the sign on the side of the road keeps some drivers from speeding. For others, it's the police vehicle on the roadway and the prospect of being cited that is the

deterrent. For those drivers that still do not comply, there is the obvious resulting enforcement consequence.

Adopting a regulation that prohibits referrals probably won't, in and of itself, stop all referrals from occurring. However, the regulation will provide a basis for the Bureau to take appropriate action when violations do occur, and it is the enforcement of the regulation that will have the ultimate deterrent effect. If, as Mr. Kelly indicates, improper referrals will always take place, and if there were no regulation to address that, the Bureau would be unable to take any action when those improper referrals are discovered.

There are undoubtedly occasions when referrals are made with only the best of intentions. However, there are also instances when referrals are made for the purpose of developing improper business relationships and to obtain economical influence over another station. Those relationships and influences can then be used by one station to coerce another station into possibly fraudulently or illegally certifying vehicles. If this sort of behavior is allowed to occur, the integrity and credibility of the test-only component of the Smog Check Program will be compromised. Current regulation¹ already prohibits test-only stations from making referrals to test-and-repair stations. The proposed action will complete the other half of the equation by prohibiting test-and-repair stations from referring to specific test-only stations.

- b. It's time that close scrutiny be given to an applicant's background before a license is issued? My opinion is that if someone pays for a phony smog check, they are bribing a public official. That could be a much simpler case in court to prove, providing swift, sure punishment that a district attorney wouldn't have to commit days and weeks in court to finish. I submit that it is time to start making and changing regulations to protect the consumer and the air rather than trying to prevent bad people from doing what they do to circumvent the regulations.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to, the proposed action. The review of license applications and applicant's backgrounds is not addressed in the proposed action. Neither is the prosecution of criminal actions by district attorneys.

¹ See subsection (e) of Section 3340.16 of the California Code of Regulations.

2. Bob Haynes, BAR Liaison, Pep Boys Automotive, in oral testimony presented at the December 7, 2005 public hearing, offered the following comments and recommendations:

- a. I've read the proposal in its entirety and agree with everything in it. So I just wanted to go on record that Pep Boys is in agreement with all the proposed updates and changes to the regulations as stated.

This expression of support was accepted and considered in the adoption of the proposed action.

3. John P. Rodriguez, Smogman Test-Only Centers, Inc., in oral testimony at the December 9, 2005 public hearing, offered the following comments and recommendations:

- a. On page one, at the beginning of the proposed regulation changes in subsection (c) of Section 3340.1, where the word licensed is going to be removed, and again in subsection (e) where test-and repair station is defined, it's my suggestion that we insert the word inspection in place of test so that the term is consistent with the language used in DMV vehicle registration renewal notices. Specifically, when the vehicle is not directed to a test-only station, they say, "Smog inspection due." If you're going to take license out, maybe you might want to include the word inspection, because it does refer to smog inspection on certain DMV notices, and the public is used to hearing those words – they're acclimatized with those words already.

This comment/recommendation was rejected because:

The amendments to Section 3340.1 are all clarifying technical, grammatical and editorial changes that have no regulatory effect. None of these amendments will change the meaning or usage of the words and phrases being defined in this section. Furthermore, the definitions of the terms included in this section relate specifically to their use in Article 5.5 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations. These changes are also intended to maintain consistency with the use of the particular words and phrases in Chapter 5 (commencing with section 44000) of Part 5 of Division 26 of the Health and Safety Code.

With respect to the deletion of the word "licensed" from "licensed station," the word is redundant and unnecessary in that location. The word "licensed" is an element of the definition and need not be included in the subject term being defined.

The words and phrases used in DMV publications do not necessarily relate directly to the Bureau's regulations. DMV publications do not and should not

dictate what terms are or are not used by the Bureau in its regulations. The words and phrases defined in Section 3340.1 are defined for the purposes of their use in Article 5.5 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations. Common usage of these terms by the general public or even other state agencies may differ from the definitions in Section 3340.1, but that does not affect their meaning when used in, or in specific relation to, the Bureau's regulations.

- b. In the DMV notice sent when the vehicle is directed, it says, "Smog certification required at a Test-Only Center." Instead of referring to us as test-only stations, as in subsection (d) of Section 3340.1, you might want to start calling us test-only centers, like the DMV is using in the notice to the general public.

This comment/recommendation was rejected because:

Please refer to comment 3., a. above.

- c. Then, in subsection (f) of Section 3340.1, the word "licensed" is going to be removed before the word "technician." I would suggest that maybe the word "automotive" be added, so that it could be referred to as "automotive technician."

This comment/recommendation was rejected because:

The use of the term "automotive technician" in relation to a "smog check technician" or the Smog Check Program would be inaccurate, inappropriate and a contradiction of terms. The term "automotive technician" is already statutorily defined in the Business and Profession Code² and should not be confused with smog check technicians in the Smog Check Program, which is established in the Health and Safety Code. Licensure is not required in order to be an "automotive technician." While an "automotive technician" may perform some of the same tasks and functions that are performed by a "smog check technician," when those tasks are performed within the purview of the Smog Check Program that technician must be licensed as a "smog check technician." An "automotive technician" is not the same as a "smog check technician," as "automotive technicians" may address one or more of a full spectrum of repairs not related to the Smog Check Program.

Also, please refer to comment 3., a. above.

- d. In line two of subsection (g) of Section 3340.1, it refers to a "tamper-resistant" instrument. I don't know how relevant that statement is, but "controlled access" might be a better term to use.

² Subdivision (g) of Business and Professions Code § 9880.1 defines "automotive technician" as "an employee of an automotive repair dealer or that dealer, if the employee or dealer repairs motor vehicles and who for a salary or wage performs maintenance, diagnostics, repair, removal, or installation of any integral component parts of an engine, driveline chassis or body of any vehicle..."

This comment/recommendation was rejected because:

The term “tamper-resistant” is specifically used in subdivision (b) of Section 44030 of the Health and Safety Code to describe the testing equipment that smog check stations are required to use. This term is also used in the BAR-97 Emission Inspection System specifications incorporated by reference in Section 3340.17 of the California Code of Regulations. The general standard included in the specifications is tamper resistance, of which, controlled access is but one component. In this case, “tamper-resistant” is the correct term to use in the definition of an “emission inspection system,” and is consistent with existing law.

- e. On page two, in subsection (p) of Section 3340.1, the term “test-only facility” is defined. This term was first used in Health and Safety Code section 44000 and means a facility contracted by the Bureau to test and inspect vehicles. Now, I believe that they’re talking about the referee’s facility there, or is that just a repeat of the definition that we’re clearing up in subsection (d) when it refers to smog check test-only station?

This comment/recommendation was rejected because:

Subsection (p) is not just a repeat of the definition in subsection (d). There is a specific distinction between “test-only station” and “test-only facility,” as described in those two subsections. The basic difference is that a “test-only station” is licensed by the Bureau and a “test-only facility” is contracted by the Bureau.

“Test-only facility” is first mentioned in statute, with any specificity, in Section 44010.5 of the Health and Safety Code³. To implement the general test-only component of the Smog Check Program, the Bureau chose to use licensed “test-only stations” rather than contracted “test-only facilities.” In addition, the Bureau may contract with “test-only facilities” to provide referee functions. Therefore, the term “test-only facility” may apply to the contracted referees.

- f. The definitions you’re about to change are going to affect certain mailings that the DMV sends out. These are the words that are going to be used for the general public. These same comments would apply to the use of these words and terms throughout Section 3340.1 and all the other sections being amended in this proposed action.

This comment/recommendation was rejected because:

Again, the amendments to Section 3340.1 are all clarifying technical, grammatical and editorial changes that have no regulatory effect. None of these amendments

³ Health and Safety Code § 44010.5 establishes the basic requirements and provisions for the test-only component of California’s Smog Check Program, including the options for implementing the component through contracted test-only facilities or licensed test-only stations.

will change the meaning or usage of the words and phrases being defined in this section. Furthermore, the definitions of the terms included in this section relate specifically to their use in Article 5.5 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations. These changes are also intended to maintain consistency with the use of the particular terms and phrases in Chapter 5 (commencing with section 44000) of Part 5 of Division 26 of the Health and Safety Code.

The words and phrases used in DMV publications do not necessarily relate directly to the Bureau's regulations. DMV publications do not and should not dictate what terms are or are not used by the Bureau in its regulations. The words and phrases defined in Section 3340.1 are being defined for the purposes of their use in Article 5.5 of Chapter 1 of Division 33 of Title 16 of the California Code of Regulations. Common usage of these terms by the general public or even other state agencies may differ from the definitions in Section 3340.1, but that does not affect their meaning when used in, or in specific relation to, the Bureau's regulations.

- g. In Section 3340.16, where it lists all of the equipment and manuals a test-only station must have, I suggest that instead of using the word "a," you might use "one." Subsection (a), paragraph (2) says, "An ignition timing light." I suggest that you might want to substitute the word "one" for "an" or "a" – for example, "one" ignition timing light, "one" handheld vacuum, "one" fuel pipe restrictor dowel gauge, and so on.

This comment/recommendation was rejected because:

Section 3340.16 specifies the minimum requirements for equipment. It makes little or no difference whether the word "one" or the words "a" or "an" are used. Within the context of this regulation, the meaning is essentially the same. In this instance, the use of "a" or "an" instead of "one" in the proposed amendments is simply a matter of preferred style and will remain unmodified.

- h. I really am excited about the deletion of all that required telephone line stuff and the other deletion of a lot of the stuff where they refer to the electronic transmission. I support that wholeheartedly.

This expression of support was accepted and considered in the adoption of the proposed action.

- i. On page nine, you're adding subsection (d) to Section 3340.16.5, where it's talking about Smog Check test-and-repair stations shall not refer a vehicle owner to a particular test-only station for the testing and certification of vehicles. I believe the idea here is to try to stop people that are trying to build relationships on favoritism between stations. I believe that's the direction this is going. I believe that BAR really is trying to thwart any common friendships or bonds

made in the industry by that particular reference of sending a consumer to a particular test-only or a particular test-and-repair station, directing vehicles or whatever. I have a little bit of concern with that, because in trying to build and establish a small business, I feel that these referral-type of customers are something that you want to gain. It's something that you want. It's part of your reputation, just like any business that refers directed cars to you. It could be your barber who knows that you're a smog check station and he's talking to his customer and the customer asks if he knows about a test-only station. The barber sends them to you because of your reputation.

Other concerns would be with regard to language barriers. Because there are a lot of Hispanic and other languages that are being spoken by the general public out there. There are not a lot of stations that have the translating capability or are able to understand or communicate properly with customers who speak other languages. It just seems that building a regulation like this would kind of defeat the purpose with regard to communicating to the general public, the consumer, the ideas of the program through the industry that represents it.

This provision assumes that all the stations are doing this particular type of referral based on favoritism or something that they want to get back from that other station. But, the number one question that I get from a lot of people when they're coming into the station is, "Are you a test-only station or are you a repair station? Can you fix my car?" They don't really even understand, but I tell them, "I'm a test-only station," and they say, "Well, no, I want somebody that can fix my car." Then they ask, "Well, where's the closest place," and I'll say, "Well, there's one right there that's close to me or there's one over here," or I provide the list of test-and-repair stations to them as required. They don't want the list. They throw it in my face like, "I didn't ask you that. I asked you for the closest one." Why are you going to give them a list that has 2, 20, 200, or however many stations on it?

It's hard to communicate a lot of these issues to the general public, and when you change the regulation like this, that hampers my ability to send a person that doesn't understand English and maybe only understands Vietnamese or Hmong or Chinese or Spanish, to someone that I know can better communicate with them. I'm in a universal community over there on Stockton Boulevard in Sacramento, and I do get a wide variety of people. I would feel more comfortable with the ability to say, "Hey, you might want to take your car to a person here who I know speaks Vietnamese," or, "I know this station speaks Spanish. They can communicate this to you properly." I don't feel like I can always communicate it properly to some people. I think that adding regulations to stop this particular directing of vehicles to a particular station might be better dealt with if we identify the stations that are misusing that type of referral system.

As a professional and as a trusted inspector, someone who signs the perjury statement every time, I would like to think that the Bureau would think of me

more innocently. If I make a decision to refer a customer to a particular station because of communication barriers or whatever, I should be allowed to do that in good conscience. I should not have to worry about someone prosecuting me for suggesting that the closest station to me is right there, or right here.

Some of the proposed changes with regard to what the intent is when you're directing a vehicle to a repair station is something that should not be assumed to be wrong when you're doing that type of directing.

This comment/recommendation was rejected because:

The prohibition against test-only stations referring customers to specific test-and-repair stations is currently in effect in existing regulation⁴.

While there may be instances when referrals are made for the reasons that Mr. Rodriguez describes, there are also instances when referrals are made for other than innocent reasons. To try to base this prohibition on the intent of the parties would be unnecessarily complicated and confusing, not to mention unduly difficult and burdensome to enforce. It is much clearer and simpler to prohibit all referrals from test-and-repair stations to test-only stations, as is the currently the case with referrals from test-only to test-and-repair.

Also, please refer to comment 1., a., above.

- j. The second part of my concern about the list is the burden of preparing these lists. A four-page document times 3,000 copies to keep on hand to keep handing out to everybody just because they come in and ask you, "Where's the closest Smog Check test-and-repair station," is kind of costly for me. What I would suggest is that maybe if the list is on the state's Web site for access that we might be able to provide this list to the consumer for a fee, maybe a printing fee or something. That way I can download it right in front of them, print it for them, and give it to them, but charge them maybe a service fee or administrative fee for the cost of the paper, ink and the electricity – whatever it costs me. It may not seem like a lot to print up 1,000 of these at four pages each, but it is when you're on a limited budget like I am.

This comment/recommendation was rejected because:

The addition of a new subsection (d) in Section 3340.16.5 includes a requirement for test-and-repair stations to make available to customers a list test-only stations in certain specified circumstances. This requirement was patterned after subsection (e) of Section 3340.16 which states, in pertinent part, that a "test-only station shall **make available** to each customer a list ... of all smog check stations in that region licensed to make repairs of vehicular emission control systems..."

⁴ Subsection (e) of Section 3340.16 provides, in pertinent part, that "[n]o smog check test-only station may refer a vehicle owner to a particular provider of motor vehicle services for emissions related repairs."

[emphasis added] The key phrase in these subsections is “make available” which in common usage could be taken to mean to post in public view or to show to someone – in this case, a customer. That is what was intended in the adoption of subsection (e) of Section 3340.16 and that is what is intended in the adoption of the new subsection (d) of Section 3340.16.5. If, for example, the Bureau had intended that customers be given their own copy of the list, the word “provide” would have been used instead. To “provide” has been commonly defined to mean, “to give for retention,” and that is not what is intended here.

Furthermore, to require stations to give each customer a copy of the list would impose an unreasonable and unnecessary burden and expense on those businesses. Smog Check stations have been and will continue to be advised by the Bureau that the lists can be obtained on-line through the Bureau’s Web site with little or no effort or cost to the station. All that would be necessary in order to make the list available to customers would be to allow them to view the list on a computer screen, or to download and print one list that can be shown to customers as needed. When the list is shown to a customer, he or she has the opportunity and ability to look for familiar business names or businesses in a particular neighborhood. The customer does not have to copy down the name, telephone number and address of every business on the list, nor is it realistic to think that anyone would do so.

While making the list available to specified customers is all that is necessary in order to comply, there is nothing to prevent a station from actually giving them their own copy of the list. That is purely discretionary on the part of the station. Therefore, any costs associated with printing and reproducing lists to be given out would also be discretionary and not a fiscal impact imposed by the proposed action.

- k. A suggestion that I have is that maybe we might want to go back to that double check standard of having the repaired vehicle come back to a test-only station for the after repair test and certification. There is an ample supply of test-only stations available, so it’s not like the customer’s going to have to wait any longer.

This comment/recommendation was rejected because:

If the suggestion is to eliminate the Gold Shield program, this comment is found to be outside the scope of, and not germane to, the proposed action. Furthermore, such a change would require legislative action, not a regulation change.

Health and Safety Code section 44014.2 specifically requires the Bureau to implement a program to provide for the repair, retest and certification at a single location, of test-only directed vehicles that fail a Smog Check test. The purpose of this requirement, as stated in the statute, is “to prevent the necessity for additional trips back to the test-only station for certification.”

- l. If a test-and-repair station had to do an after-repairs pretest before they were actually going to send the cars back to the test-only stations, the inspection report itself would have evidence for the test-only station that the repairs have been made properly. I suggest to my consumers that no matter who they choose off the list that I provide for them that they get the station to do an after-repairs pretest. That way, when they do come back and take the retest with me they can hand that after repairs pretest to me and say, "Look, I'm passing." It's just a suggestion that maybe you might want to take into consideration. It helps a lot of the time in following up after a repair. If they have a documented pretest after the repair from the station that did the repair, then my test results should line up almost identically, being that we're using the same type of machines. When I do the final certification, it does line up with the results of that after repair pretest.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

- m. I see \$10 fees being charged by test-and-repair stations for just accessing the computer to tell the customer they have a test-only directed vehicle. They charge for almost anything and that's kind of sad.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

4. Ben Rue, California Test-Only Center, in oral testimony at the December 9, 2005 public hearing and in an e-mail dated and received December 9, 2005, offered the following comments and recommendations:

- a. I asked for one of the regulation changes, and I'd like to touch on that one first. It has to do with prohibiting test-and-repair stations from referring customers to a specific test-only station. Running a test-only Smog Check station and working in the automotive repair service industry for some time, I've come across situations where test-and-repair stations would refer vehicles to specific test-only stations. Then, they make it a point to tell the test-only station that they've sent 9, 10, sometimes 20 cars to them. Subsequently, when the test-and-repair station has a vehicle that they've spent thousands of dollars on trying to fix and still can't fix it, they will try to take advantage of the bond developed with the test-only station to get the vehicle certified. In this way, they can cover up and hide their incompetence and the fact that they've been parts guessing. They make this bond with the test-only station, because they need to get vehicles certified that aren't actually compliant.

Test-and-repair stations will very often send a car in to the test-only station with the timing connector cut or the timing retarded on the vehicle or they'll ask the test-only station to rev up the engines – which violates the testing procedure – before the test to get the vehicle to pass. Of course, I've always declined that, because not only is it wrong, it undermines our entire Smog Check program and it goes against everything we're trying to do at test-only. I know a lot of other test-only stations have cooperated, and they've gotten those referrals, because I don't get any referrals hardly from any test-and-repair stations. As a matter of fact, they tell people quite specifically to stay away from my stations because I have always refused to certify the vehicles that the test-and-repair stations can't repair. This has hurt me in business quite a bit, because I don't get those referrals.

The fact of the matter is most people with test-only directed vehicles still go to test-and-repair stations first, because they don't understand the difference. So, subsequently, they get a specific referral. The test-and-repair station will often give a coupon for, say, \$5 or \$10 off to go to a specific test-only station. They're doing that so that when they need a car passed, they can go down to the test-only station and they'll pass the vehicle that the test-and-repair station can't fix. That's why I've asked for this regulation, because it's really unfair to those of us who are not fraudulently certifying the vehicles that the test-and-repair stations can't fix. It's important for test-only, and I thank you very much for having this regulation included in this hearing, and in the scope of suggested changes.

This expression of support was accepted and considered in the adoption of the proposed action.

- b. In the past, when the Bureau had a test-only coordinator, he explained that it was our responsibility to provide each motorist with a failing vehicle a list of all of the test-and-repair stations, and he used to prepare the lists and provide it. He no longer coordinates test-only now, and the list has become really outdated. I wrote a letter to the Bureau stating that the list needs to be updated. I even prepared lists for different areas throughout the state. The Bureau just said that "provide" means to make available and all that is required is to have one list to show to people. It is really unreasonable to expect a motorist with a failing vehicle to take a list, look at it in a matter of a couple of seconds, and write down a couple of phone numbers. They really need to have that list in their hand so that they can go through and ask a lot of specific questions at automotive repair facilities, and they should have a list of absolutely all of them, because that empowers them. I think it's very important, that we actually give them a preprinted list and we say here, take it. We shouldn't have to give them a list if they just come in and they have their car tested elsewhere and want a test-and-repair station list, but it should be provided at no cost, included in the cost of the Smog Check for customers with failing vehicles. That was the way that it was originally understood and that's the way most of us in the test-only industry do it. Of course, our lists vary quite a bit because we've had to make our own lists, but that's the way most of us still do it.

This comment/recommendation was rejected because:

Please refer to comment 3., j., above.

- c. As far as test-and-repair stations providing a list, I think that it should be amended, in subsection (d) of Section 3340.16.5, to clarify that where it says make available, they need to give the list to the consumer in order to comply. It takes me eight sheets of paper and a printer to produce a list. I figured out it costs me about two cents a list between stapling, ink, paper, but you know what? I recover it in the cost of a Smog Check. It's not a big deal, and the test-and-repair station list that I give covers all of the enhanced area stations in California north of the San Joaquin county line, aside from the Bay Area. It takes up eight pages, four sheets of paper if it's copied back-to-back, and it's really not that big a cost. It costs me about two cents a list to produce and copy, so I'm not that worried about the cost of it. On the other hand, test-and-repair stations are not making any money when they have a customer with a test-only directed vehicle. It would be unreasonable for them to print out a list and give each person an individual copy of a list, unless they're allowed to charge for it. Like a fee of no more than 50 cents if they make their own copies.

This comment/recommendation was rejected because:

The key phrase in this subsection is "make available" which in common usage should be taken to mean to post in public view or to show to someone – in this case, a customer. That is what is intended in this provision of the proposed action and that is consistent with common interpretation. If, for example, the Bureau intended that customers be given their own copy of the list, the word "provide" would be used instead. To "provide" has been commonly defined as meaning "to give for retention."

To require stations to give each customer a copy of the list would impose an unreasonable and unnecessary burden and expense on those businesses. Smog Check stations have been and will continue to be advised by the Bureau that the lists can be obtained on-line through the Bureau's Web site with little or no effort or cost to the station. All that would be necessary in order to make the list available to customers would be to allow them to view the list on a computer screen, or to download and print one list that can be shown to customers as needed. When the list is shown to a customer, he or she has the opportunity and ability to look for familiar business names or businesses in a particular neighborhood. The customer does not have to copy down the name, telephone number and address of every business on the list, nor is it realistic to think that anyone would do so.

While making the list available to specified customers is all that is necessary in order to comply, there is nothing to prevent a station from actually giving them their own copy of the list. That is purely discretionary on the part of the station.

Therefore, any costs associated with printing and reproducing lists to be given out would also be discretionary and not a fiscal impact imposed by the proposed action.

Also, please refer to comment 3., j., above.

- d. Regarding the list of station equipment in Section 3340.16 (pages 4 and 5 of the proposal), it is impossible on vehicles such as the Ford Taurus/Mercury Sable/V6 Lincoln Continental and most Class A motor homes, without major disassembly of the vehicle, to check the Base dynamic ignition timing. That requires the use of a mirror on a stick. Of course smog check stations that are actually checking timing on these vehicles already have a mirror on a stick. But most people in the smog check program do not actually check the timing on these vehicles ever, as they are required to do. It should be required and added into the list of station equipment for all smog check stations, that they are required to have an adjustable mirror capable of going between the accessory belt and the inside fenders on most front wheel drive vehicles so as to enable viewing of the timing marks. Any such mirror can be purchased at about any hardware store or auto parts supplier for about \$4. If stations were required to have such a mirror they would then have even less excuse and more importantly less reason for not checking the timing on such vehicles. Checking timing is especially important because all it takes to pass an emissions test is for the ignition timing to be retarded. Very rarely does timing get checked on the above mentioned vehicles.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action. The proposed amendments to Section 3340.16 are all clarifying technical, grammatical and editorial changes without any regulatory effect. No where in the proposed action is there any reference to adding or deleting any required tools or equipment.

- e. There is a requirement in subsection (h) of Section 3340.17 (pages 11 and 12 of the proposal) that the telephone line remain connected to the EIS at all times. This regulation is often cited when test-and-repair stations perform smog checks on test-only directed vehicles and/or when basic area stations perform smog checks on enhanced area vehicles. The regulation should provide the penalty that if a station performs a smog check on a vehicle that they are not authorized to inspect, as a result of a telephone communications problem such as the phone line being disconnected, that the ability for their station to perform “offline” or “no DMV match” inspections should be terminated. For a first time perhaps for like 30 days. A second time in five years for about 90 days and a third time for a year, etc.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action. The suggested penalty would be essentially the equivalent of a suspension, which can only be imposed through formal administrative action under the administrative adjudication provisions⁵ of the Administrative Procedure Act, which includes due process. Sufficient authority already exists outside Section 3340.17 to allow the Bureau to pursue the action suggested by this comment.

- f. It used to be that the bureau gained access to the analyzers via modem at night. Now that has changed. Most of the EIS don't even answer the phone line. Test-and-repair stations need to be prevented from inspecting test-only directed vehicles, and basic area stations need to be prevented from certifying enhanced area vehicles. Test-and-repair stations and basic area stations beat this enhanced area and/or test-only requirement not only by disconnecting the phone line but also by entering one character of the VIN or License plate number incorrectly, or entering "none" for the license plate. Subsequently, the regulations need to be changed accordingly to stop test-and-repair stations from certifying test-only directed vehicles. Merely changing the VID software program just to fill in the holes in the VID/EIS communications could do this.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action. The only provision included in the proposed action that addresses the issue of test-and-repair stations certifying test-only directed vehicles is a clarifying change made in subsection (e) of Section 3340.41. Furthermore, entering false information into the emission inspection system is adequately addressed in subsection (c) of Section 3340.41.

- g. Another thing that happens quite commonly, especially at Gold Shields - it goes a little bit beyond the scope, but the test and repair stations, when they get test-only directed vehicles in, they often charge motorists anyway, even though they can't do the inspections. They charge anywhere between 5 and \$50 to tell people, "Oh, your car has to go to a test-only station. We can't do a Smog Check on it." They're already often charging for it subsequently, and if they're going to charge to tell people that their vehicles have to go to test-only, they should at least provide them with a total complete objective list of all of the test-only stations in a given area. I know of several stations, especially Gold Shield stations that tell people, and even advertise that they can certify test-only directed vehicles. "No problem", they say; "Come on down." Then, when the customer gets down there, they're told, "Oh well, we charge a \$10 fee if your vehicle comes up as going to test-only." So then they charge them a \$10 fee and say, "Your car has to go to test-only." Then they tell them, "Oh, that's what the state charges us," but that's

⁵ The administrative adjudication provisions of the Administrative Procedure Act are found in Chapters 4.5 (commencing with Section 11400), and 5 (commencing with Section 11500) of Part 1, Division 3, Title 2 of the Government Code.

completely untrue. The state doesn't charge them anything, not even for communications since it's charged per test. So, they're really lying to motorists. I deal with those people that are mad about that every day. They go to the test-and-repair stations and are told, "Oh well, we can't do it," and they are still charged anyway.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

- h. On page 13, there's something else that needs to be made a little clearer. It says in the text that it is a requirement that Gold Shield stations only certify test-only directed vehicles that they have repaired. There have been a lot of instances where I have recorded that the Gold Shield stations have been certifying vehicles that are test-only directed that they have made no repairs on at all, or even the necessary repairs to bring the vehicles to compliance. They have actually been fraudulently certifying vehicles that other test-and-repair stations cannot repair. I've documented several examples of that and sent it to the Bureau.

The VID policy doesn't comply with the law as it stands right now. Gold Shield stations can do as many Smog Checks on a vehicle as they want. Then, they can certify the vehicle and there's no limitation on it as long as the test-only directed vehicle has been to a test-only station. Regardless of whether the vehicle's been repaired or who has repaired it, it's not a requirement that they enter repairs into the analyzer before they can certify the vehicle. When I've asked the Bureau about this problem, they say, "Oh well, there's no way for them to know if the car was test-only directed or not." So, the VID policy needs to be changed to comply with the law.

The test-and-repair stations should definitely not be able to certify the vehicles unless they have first entered the repairs in their analyzer. Then they should be allowed one chance to certify the vehicle. When I go through and I look at the vehicles that have failed at my station and have been subsequently certified at Gold Shield stations, I see them often tested sometimes as many as 25 times in a row before the certificate is finally generated. They'll enter repairs in between the third and fourth tests that they've done, but for all the other tests, they haven't entered any more repairs. Finally, after the 16th or 17th test, all of a sudden the vehicle passes. I see that quite commonly. The Bureau needs to enforce more that they actually make the repairs on the vehicles when they are certifying test-only directed vehicles.

I've even documented several instances where vehicles have had repairs entered; have been to five and six different test-and-repair stations and finally pass; then go back to a test-only and fail; and then go to a Gold Shield station and passed the first time. It really undermines everything we're trying to do in the Smog Check

program when those vehicles that nobody knows how to repair are getting fraudulently certified. A chain is only as strong as the weakest link and the weakest link is usually the Gold Shield station.

The wording there needs to make it clear that the Gold Shield test-and-repair station has to perform the repairs before they can certify the vehicle. Otherwise, they might as well just be test-only stations that can make repairs. There is really no advantage of having a test-only system with Gold Shield stations if Gold Shield stations are allowed to step beyond their authority. They're certifying test-only directed vehicles that they haven't actually fixed; that have been repaired at regular test-and-repair stations, and that should go back to a test-only station. They're going to the Gold Shield stations instead and getting certificates on them, often certificates that are fraudulently issued.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action. The issue of Gold Shield stations performing after-repair certifications of test-only directed vehicles is already adequately addressed in Section 3392.2 of the Gold Shield Regulations⁶ and in Health and Safety Code section 44014.2. The provision included in the proposed action that addresses this issue, the amendment of subsection (e) of Section 3340.41, is merely clarifying those existing provisions and has no regulatory effect.

- i. Another issue to touch on is subsection (e) of Section 3340.16.5 (page 9 of the proposal), where it says, "A Smog Check test-and-repair station shall not have ownership in, corporate interest in, nor any financial interest in a smog check test-only station within a geographical radius of 50 statute miles of the test-and-repair station." This is something, too, that really ought to be changed. It is a definite conflict of interest having both a test-only station and a test-and-repair station anywhere. It was originally limited to 50 miles because it was suggested that when test-only was first starting, that there would not be enough people to get into the test-only program. Now, there is an absolute abundance of test-only stations and there is no shortage of them anywhere. Someone with both a test-only station and a test-and-repair station, even 50 miles apart, will not be discouraged by that distance when they have sold \$500 worth of repairs that didn't make any difference and they still need to get the vehicle certified. It should be that if you own a test-only station, you couldn't own a test-and-repair station anywhere.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

⁶ California Code of Regulations, Title 16, Division 33, Chapter 1, Article 10 (commencing with Section 3392.1).

- j. It goes beyond the scope of the regulations today, but I know of a lot of places that own test-only stations and also own automotive repair dealers. I deal with people all day long that have been referred to those other automotive repair dealers from the test-only stations that they own. Then they argue that, "Oh well, we're not doing an emissions-related repair. We're doing a check engine light on diagnosis or an engine performance diagnosis." That seems to work for the Bureau reps, and the automotive repair dealers are diagnosing and repairing the cars when they're not licensed to do so. I think that goes beyond the scope of the proposed regulations today.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

- k. I need to touch on, as far as the telephone line and communications go, this whole concept of dialup networking. It is an archaic concept from the 70's and 80's. The modern way we communicate is through networks and communications. I've suggested several times that the emissions test analyzer systems be modified to get rid of this dialup networking. Just drop a network card in the analyzers and plug them into a broadband router, and all the stations on there could go right over the Internet to a secured server to the BAR and get rid of all those connections costs and networking fees. I think I'd rather give the Bureau money directly than give it through some communications contractor to run a dialup server. I think that the law should be changed, or at least the law should be clarified, to allow a broadband connection to be used, or that it's at least planned for.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

- l. Something else I've thought of is using Internet phones, because it could save costs. It costs me about \$25 a month just for each basic analyzer lines. Now they have those Internet phones, where you can plug the phone line into a regular phone line and it plugs into a broadband connection. It's voiceover IP and it gives you multiple phone numbers. With that service you can use one phone, and they give you sometimes four or five different phone numbers, like Vonage. So, you could, in theory, use one phone line changer and use an Internet phone and save a lot of money. That's something that should be incorporated in if we're going to continue with this dialup networking; to allow the use of an Internet phone. Really, the hardware should be changed.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

- m. Going back to the Gold Shield issue, I've been documenting many, many vehicles that have been certified at Gold Shield stations that have not actually been repaired and have actually had their emissions control systems tampered with. I've been sending them to the Bureau for many years now. The Bureau's enforcement has definitely not taken enough action on them. There hasn't been any noticeable action against those stations for at least a year. There's one station on Northgate Boulevard from which I've documented four vehicles that have been fraudulently certified, and that station is still a Gold Shield station. It wasn't a Gold Shield station for about a month, but the same owner just got a new station license and is still Gold Shield. Nothing's changed over there. They're still fraudulently certifying vehicles, and I don't think that they've ever fixed even one single, solitary vehicle. When I've sent this information to the Bureau, their reply letters say that enforcement's going to handle this.

Well, the fact of the matter is all of the Gold Shield stations are doing it to some degree. Some are worse than others are. All of them, when they have a car that they can't fix by replacing the oxygen sensor, the EGR valve, or the catalytic converter, they're at a loss. They can't fix the cars. They have a real problem and when they're allowed to certify them, they just fraudulently certify them. They have no reservations about it, and hardly any of them get caught.

I've had some vehicles that I've dealt with that have been repaired in CAP twice in a row. There was an Aerostar that I'd come across recently that was certified at a Gold Shield station. It was in CAP for two biannual cycles in a row and it had never been fixed. It's got the same problems, and that's one of those vehicles that have been tested seven times just before it was certified. There's little or nothing being done about this. In the CAP program, they're just throwing a whole bunch of money to Gold Shield stations to actually tamper with vehicle emission control systems.

Not only is it a waste of our tax dollars, but it undermines everything we're trying to do in the Smog Check program. We're trying to fix the vehicles; we're not trying to destroy them. Unfortunately, when you allow test-and-repair stations to certify their own repairs, the vehicles often don't get repaired. That's why we started test-only, and that's why I got into test-only.

I was the person that could actually fix the vehicles, and I notice that very few people in the industry were actually fixing them. The skills that I have, of being able to take responsibility and diagnose the vehicle, should be in demand, but unfortunately, they're not. The people whose skills are in demand are those who can sell a whole bunch of stuff and quickly, fraudulently certify vehicles. Sadly, that happens most of the time, but that goes beyond the scope of the regulations here.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action.

- n. In subsection (t) of Section 3340.1 (page 3 of the proposal), the definition of clean piping needs to be revised. With the onboard diagnostics (OBD) in new vehicles, unfortunately a lot of people in the automotive repair service industry can't fix the problems that cause OBD monitors register. It often happens that to overcome this, they will not just clean pipe with emissions from another vehicle, but may also defeat the OBD functional check by plugging the OBD connector into another vehicle or an OBD simulator. I think that should be added into the definition of clean piping; that is, plugging the OBD connector into another vehicle that is not the vehicle being certified.

I think we should also go a little further, because for every vehicle that meets the OBD II standard, the VIN number of the vehicle is required to be programmed into the OBD or vehicle power train modules, and it can be retrieved with a scan tool. At the present time, analyzers do not read the VIN numbers in the vehicle power train modules, but the ability does exist. The analyzers should be programmed to read the VIN number in the module and compare it to the vehicle being tested. If they don't match, the vehicle shouldn't get a certificate.

There are some circumstances where they won't match. For example, I have a car that was converted from an automatic to a manual transmission. To get the right software, it had to have a different VIN number in the module. So, in a case like that, the car should have to go to the referee for certification. Generally, if the VIN numbers don't match the analyzer should at least pull up a flag. It should pull up in the VID and you'd be able to see it. If the VIN numbers didn't match and the same VIN number keeps coming up over and over and over again, that should definitely throw up red flags.

I've also seen one of the other tricks they do now. They keep live power to the powertrain control modules so that the check engine lamps will not turn on. They'll actually use a jumper to keep power over to the powertrain control module, which will keep monitored codes from setting. The vehicle will not actually pass a Smog Check in that condition, because the OBD II readiness monitors are complete. When they've sold a whole bunch of repairs and they don't know how to fix the car that's one of the tricks they'll use. I deal with people where their vehicle's monitors keep resetting back to incomplete on their cars each time they switch the key off. Occasionally, their check engine lamps do turn on.

The definition of clean piping should be expanded to include the OBD II connector being plugged into a vehicle that is not the correct vehicle. That is as much fraud as using the emissions of another vehicle.

This comment/recommendation was rejected because:

This comment is found to be outside the scope of, and not germane to the proposed action. The practice Mr. Rue describes is not “clean piping.” This is a relatively new development in circumventing legitimate test and inspection procedures. The Bureau is aware of the practice and is taking appropriate disciplinary action against technicians and stations when violations are sufficiently documented.

There were no further comments, objections or recommendations received within the public comment period regarding the proposed action.